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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 818

THE TIMKEN ROLLER BEARING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 27-41) is not yet reported. The Board's decision and order (P.A. 60a-64a)[1] are reported at 138 NLRB 15.

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[1] "P.A." and "B.A." refer to the Appendices to the briefs of petitioner and the Board filed in the court below. "Stip Exh. 1A and 1B" refer to exhibits filed in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. 41) was entered on December 21, 1963. The petition for a writ of certiorari was filed on February 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to furnish directly to the Union, upon its request, specific wage data sought in connection with particular grievances and general wage data sought for the purposes of administering its contract.

2. Whether substantial evidence supported the Board's finding that the Union had not waived its statutory right to wage information needed to administer the bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 *et seq.*) are set forth in the Appendix to the petition (Pet. 81-85).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE RELEVANT CONTRACT PROVISIONS

For many years, the Union [2] has been the bargaining representative of all production and maintenance

[2] United Steelworkers of America, AFL-CIO, and its Local No. 1123.

workers at the Company's bearing, steel and tube plant at Canton, Ohio (P.A. 20a, 58a-59a). Each product and operation in the plant is assigned a fixed wage rate. These rates are based upon a complex system of detailed time studies, operation observations, personal motion recordings, and evaluations of every element and aspect of the production process. The various factors considered are reduced to writings called time-study sheets. As the Company's production needs change, old methods are re-evaluated, improved and more efficient systems are developed, and further analyses result in new basic time studies and new wage rates. The procedures followed in making all assessments are set out in certain manuals and memoranda used by the Company's time-study men and production engineers (P.A. 20a).

The Company's practice of using this complicated technique to fix wages and of repeatedly readjusting wages has been recognized in its collective bargaining agreements with the Union, including the one negotiated and signed in February 1960 (P.A. 21a, 311a-313a, Stip. Exh. 1A, pp. 6-16). Article V, Section B of the 1960 contract provides that the Company may adjust existing wage rates under any of six enumerated circumstances, *e.g.*, changes made in equipment, establishment of new occupations, introduction of new products (Stip. Exh. 1A, p. 8). Section C of Article V provides that (Stip. Exh. 1A, p. 9)[3]:

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[3] There is no substantial difference between the 1960 and the earlier 1956 contract insofar as the wage and grievance provisions are concerned.

> Whenever any of the changes or events occur that are outlined in the preceding section of this Article and the Company shall deem it necessary or desirable to establish a new wage rate, the Company shall develop and install such new rate in accordance with the Company's practice in effect on the date of this Agreement.

Section C further provides that any employee who is affected by such a new rate may file a grievance (P.A. 21a; Stip. Fxh. 1A, pp. 9-10).

Article IX of the 1960 contract sets forth the means for adjusting grievances (Stip. Exh. 1A, pp. 35-44). Section E of that Article (Stip. Exh. 1A, pp. 36-37) reads:

> The parties agree that the provisions of this Article IX provide adequate means, if followed, for the adjustment and disposition of any complaints or grievances. Any employee who has a complaint concerning wages, hours and working conditions that directly affect him at the time of such complaint, may discuss the alleged complaint with his immediate supervisor in an attempt to adjust it and if such complaint is not adjusted to his satisfaction shall be entitled to file and process a grievance as provided in this Article, "Adjustment of Grievances."

Section E of Article IX goes on to outline four steps which may be taken if an employee and his supervisor are unable to adjust a grievance (Stip. Exh. 1A, pp. 37-44). First, the employee confers with his foreman, and next with his general foreman. If it is necessary to proceed further, the grievance is considered by Union and Company representatives at a special

meeting. The fourth and final step is binding arbitration before an arbitrator whose jurisdiction is limited to "interpretation and application of the agreement" (Stip. Exh. 1A, p. 39).

2. THE UNION'S REQUEST FOR DATA

On July 18, 1960, about five months after the 1960 agreement had been signed, the Union wrote a letter to the Company requesting wage rate information relating to five grievances which were then pending arbitration (P.A. 23a; 119a-122a).[1] As to each of them, the Union requested: (a) "the original time-study sheets and other documents relative to both the prior rates and the new rates"; (b) "all other data, studies (including original time-study sheets) and other information which is used to determine the rate of pay for each such job"; and (c) "all documents, studies and other information which is used to evaluate such jobs, both prior to the change and thereafter. * * * and also in assigning incentive rates thereto, including full information as to the weights given to each factor used to arrive at a final decision on the established rate and what factors are considered in making such decision." The Union explained that this information was needed because "each of these cases protest the institution of new reduced rates in place of

[1] These grievances arose from newly established wage rates which the employees contended were improperly established. The grievances had proceeded beyond the third step of the grievance procedure as far back as the summer of 1959, but were held in abeyance pending the completion of negotiations for the 1960 contract (P.A. 21a-23a; B.A. 10b-15b).

rates theretofore in effect and/or the adequacy, fairness and method of establishment of new rates in their stead." (*Ibid.*).

The Union's letter further asked the Company for "time-study manuals, instructions and procedures used in making of time studies in your plants," and "manuals, instructions, and procedures used in development of 'standard data' and the application thereof in the development of job rates in your plants." These data were to be supplied "generally as to * * * procedures and practices" and were not to be "limited to the specific grievances and situations herein before set forth." The Union stated that the specific and general information sought was necessary in order for it to present the grievances intelligently at the coming arbitration proceedings and to "properly" and "intelligently evaluate the various rates of pay in the plants" and "to properly administer the contract" (P.A. 24a; 122a).

On August 1, 1960, the Company advised the Union that it would not furnish the requested data. It was the Company's position that any information which the Union needed had to be obtained under the grievance and arbitration procedure of the contract, and, further, that the Union, in bargaining for and executing the 1960 agreement, had waived its right to obtain such data directly (P.A. 24a; 122a-127a).[2]

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[2] The Union's contract proposals, in the negotiations for the 1960 contract, contained a clause which obligated the Company to furnish, on demand, the general type of information sought in the Union's letter to the Company (P.A. 40a-41a; 167a-168a). This clause was extensively discussed, but the

By letter dated August 29, the Union repeated its request for both the specific and general information (P.A. 24a; 127a-130a). On September 15, the Company again rejected the Union's demands, for essentially the same reasons (P.A. 24a-25a; 131a-133a).[5]

In two other grievances which went to arbitration, the Company's action was consistent with this position, in that it declined to furnish requested wage information unless the arbitrator directed it. In one case, the arbitrator ruled the Company was not required to furnish the information sought by the Union. In the other case, the arbitrator asked the Company to furnish some of the requested wage data to the Union, and the Company did so. (P.A. 25a-27a; 73a, 110a-118a.)

Company refused to agree to it (P.A. 11a, 14a-15a; 179a-189a, 205a-206a, 208a, 210a-230a, 232a-233a). At the bargaining sessions the Union made clear that, apart from any contract provision which might be agreed upon, in its view it was entitled to basic wage data as a matter of law (P.A. 46a; 216a).

The 1960 contract, like its predecessors, contains a wage rate information clause which merely calls for the periodic production of final rates when changed (Stip. Exh. 1A, pp. 7-8)

[5] The Company, *inter alia*, stated (P.A. 131a-132a):

> You seem to ascribe to yourself a sort of super watchdog position * * *. It is only where the employees are dissatisfied with a new rate that a grievance may be filed and you appear in the picture. At that point your interest is confined to the *newly established specific rate* and not to the rate structure *in general*. [Emphasis in the original.]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that both the specific and the general wage data sought by the Union were relevant to the performance of its function as bargaining representative, and that Section 8(a)(5) of the Act gave it the right to obtain such data from the Company directly. The Board further concluded that the Union had not "waived" its statutory right either in the 1960 agreement with the Company or in the negotiations leading to that agreement. As to the agreement itself, the Board found that the grievance and arbitration provisions were limited to disputes involving "the interpretation or application of the agreement" and did not encompass claims by the Union for wage data needed in order to carry out effectively its statutory responsibilities.[1] As to the contract negotiations, the Board found that, although the Union was unsuccessful in obtaining a provision in the contract requiring the production of wage data, there was never any intention on its part to surrender its statutory right to secure such data. Accordingly, the Board held that the Company, by refusing to furnish the wage data requested by the Union, violated Sections 8(a)(5) and (1) of the Act. (P.A. 61a-63a.)

The Board's order requires the Company to cease and desist from the unfair labor practice found, and, upon request, to make available to the Union time

[1] The Board further held that, even if the grievance and arbitration procedure were available to the Union, the mere existence of that procedure did not deprive the Union of its statutory right to obtain the information directly from the Company (P.A. 62a).

studies and other wage data and information used by the Company in classifying or evaluating jobs or fixing rates of employees in the bargaining unit (P.A. 64a, 54a-55a, 60a).

C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's findings, and enforced its order in full (Pet. 27-41).

ARGUMENT

The decision of the court of appeals is correct, and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. It is well settled that the Act confers upon a union which is the exclusive bargaining agent the right to obtain from the employer relevant wage information to enable it to process grievances or to administer other provisions of the agreement, and that the employer violates Sections 8(a)(5) and (1) of the Act by refusing to furnish such information.[*] Petitioner contends, however, that this right is qualified where the contract contains a grievance or arbitration provision; in that event, it argues, the parties must be deemed to have made that procedure the sole method of obtaining information and there is

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[*] See, e.g., *J.I. Case Company* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7); *National Labor Relations Board* v. *F. W. Woolworth Co.*, 235 F. 2d 319 (C.A. 9), reversed, 352 U.S. 938; *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58 (C.A. 1).

no obligation to furnish data unless the arbitrator so orders (Pet. 12-14). Although the question whether a contract grievance-and-arbitration provision under which claims for information may be determined provides the exclusive means for obtaining such information is important, that issue is not presented here. The Board found (P.A. 61a-62a) that the Union's claim could not be fully presented or resolved under the grievance and arbitration provisions of the contract here. The holding of the court below rests entirely upon that finding (Pet. 36-41). The threshold question is thus whether the Board and the court of appeals correctly interpreted both the contract and also the nature of the Union's claim in this case. That issue, turning as it does on the terms of a particular agreement and on an evaluation of particular conduct, is not of sufficient importance to warrant review by this Court.

In any event, the Board and court interpretation of the grievance and arbitration provisions of the contract and of the Union's information demand is reasonable and therefore entitled to stand. Although the Union requested information with respect to certain pending grievances, it also sought more generalized information for the purpose of enabling it to "intelligently evaluate the various rates of pay in the plants" and "to properly administer the con-

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[9] The court below did not pass upon the Board's alternative holding that, even if the Union could have obtained the information under the contract provisions, it still had a statutory right to obtain the information directly from the Company (p. 8, n. 7, *supra*).

tract." As the court below noted (Pet. 38), without the latter "information it would be difficult, if not impossible, as a practical matter to evaluate a new rate, to check on the fairness of the Company's determination, and to determine whether an employee had a valid grievance which should be asserted." The arbitrator, in the course of disposing of an individual employee grievance, might order the production of information pertaining to that grievance (see p. 7, *supra*), but that would not provide the Union with the more generalized information sought or answer its contention that it was entitled even to the particular information at the outset of the grievance proceeding so that it could intelligently advise the employee involved whether the grievance was worth pressing.

The Union could protect its position on the latter two issues only if it were permitted to present them as separate grievances under the grievance and arbitration provisions of the contract. But, as the court below pointed out (Pet. 37-38), Article IX (the grievance provision) provides that "only grievances involving the interpretation or application of the agreement * * * [are] eligible for appeal to arbitration." Since the right of the Union to wage information flows from the Act and not the agreement, it can fairly be concluded that its demand for information in advance of any particular grievance "does not involve the interpretation or application of the agreement." Moreover, as the court added (Pet. 38), the various steps of the grievance procedure are lim-

ited to "employee" grievances; the gravamen of the Union's claim here was not so limited.

There is no merit to petitioner's contention (Pet. 17-18) that the court below, in finding that the Union's claims for wage information could not be handled under the grievance and arbitration provisions of the contract, departed from the trilogy of arbitration cases decided by this Court in 1960. Those cases involved disputes which on their face were subject to the grievance and arbitration procedures established in the contract between the parties. The basic question was whether the federal courts, once they had ascertained that the party seeking arbitration was making a claim which on its face was governed by the contract, were required to allow the dispute to go to arbitration without weighing the merits of the claim. In holding that the courts must leave the dispute for arbitration, the Court specifically recognized the propriety of a judicial determination of the threshold question, decided here, whether the claim is within the arbitration provisions of the contract. Thus, in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-568, the Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.

This principle was reaffirmed in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241, where the Court

held that whether or not a party "was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

Nor is the decision of the court below in conflict with *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5). In that case, the Fifth Circuit (with Judge Rives dissenting) held that the company did not violate Section 8(a)(5) of the Act in refusing the union's request for information in connection with a pending grievance, on the ground that that request should be determined under the grievance and arbitration procedure of the contract. However, there, unlike here, the court found that the grievance and arbitration provision of the contract was broad enough to encompass the union's request for information. Moreover, there, unlike here, the information sought concerned only one particular grievance, and the company contended that the subject of the underlying grievance was not grievable under the contract; hence, the relevancy of the information sought by the union, and therefore its right to the information, turned on an underlying question of contract interpretation. Thus, the court majority pointed out that it could not determine whether the union had a right to the information without

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[10] The contract defined the term grievance to include "any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations." 306 F. 2d at 572, n. 6.

first determining the merits of the underlying dispute which all parties conceded to be subject to arbitration (306 F. 2d at 570-572). The Fifth Circuit's holding that the union's request for information must be presented under the contract grievance and arbitration procedure in these special circumstances is not dispositive of the different situation here.[11]

3. No issue warranting review is presented by petitioner's contention (Pet. 20-25) that in the negotiations for the 1960 contract the Union "waived" its right to obtain the data. A waiver of a statutory right must be "clear and unequivocal."[12] The record

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[11] The Fifth Circuit recognized the limited nature of its holding, stating (306 F. 2d at 575):

> We do not rule out in every situation resort to Board sanction merely because a contract dispute is pending uncompleted the contract grievance machinery. But we do hold that the Board proceeding may not be used to secure data for use in a grievance where determination of relevance and pertinency requires determination of the critical substantive issue of the grievance itself.

See also, *Local Union No. 787* v. *Collins Radio Co.*, 317 F. 2d 214, 219-220 (C.A. 5).

Nor is petitioner aided by the Board's decision in *Sinclair Refining Co.*, 145 NLRB No. 68 (Pet. 19-20, 42-44). The Board dismissed the complaint there without reaching the merits, on the ground that the controversy had in effect become "moot"; the union sought information in connection with certain grievances, the company supplied some of this information in the course of the arbitration hearing on the grievances, and, by the time of the hearing before the Board the arbitration hearings on the grievances were completed.

[12] See *National Labor Relations Board* v. *Item Company*, 220 F. 2d 956, 958-959 (C.A. 5) certiorari denied, 350 U.S. 836; *National Labor Relations Board* v. *Perkins Machine Co.*,

shows that, although the Union demanded a clause in the contract which would specifically permit it to obtain the type of wage information sought here, it continually asserted that the Act already conferred this right upon it (pp. 6-7, n. 5, *supra*). In these circumstances, it is fair to conclude that the Union was merely seeking a contract remedy, in addition to a Board remedy, for the statutory right it already possessed.[11] Thus, the Board and the court below could properly find, as they did (P.A. 63a; Pet. 34-35), that the Union's acquiescence in the Company's rejection of its proposal, far from evidencing a clear relinquishment by the Union of its basic right to obtain relevant wage information, only indicated relinquishment of the additional contract protection for that right which it had sought.

This case is distinguished from *National Labor Relations Board* v. *Nash-Finch Co.*, 211 F. 2d 622 (C.A. 8) (Pet. 23-24), by the fact that here the Company representatives knew that the position of the Union during the negotiations was that, apart from any contract provision that might be made, the Union was entitled to basic wage data as a matter of law in any event (P.A. 46a). In *Nash-Finch*, the employer, in prior years, had carried hospitalization and group

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No. 6182 (C.A. 1), decided January 23, 1964, 55 LRRM 2204.

[11] The Board found that the Union "several times urged upon the Company acceptance of the proposed [wage data] clause on the ground that it would avoid bickering and quarrelling in the course of grievances and to simplify the relationship between the Company and the Union" (P.A. 46a).

insurance for its employees and had paid Christmas bonuses; however, when the employer and the union entered into a contract, no mention was made of these benefits, and the court found that, in these circumstances, the union must be deemed to have acquiesced in their elimination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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